

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

FILED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA

2011 FEB 18 PM 1:44

CLERK *L. J. Baker*  
SO. DIST. OF GA.

ROBERT SCOTT McNEAL,

Petitioner,

v.

CV 110-110

GREGORY McLAUGHLIN, Warden,  
and SAM OLENS, Attorney  
General,<sup>1</sup>

Respondents.

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**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

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Petitioner Robert Scott McNeal, an inmate currently incarcerated at Macon State Prison in Oglethorpe, Georgia, filed the above-styled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the Court is the Attorney General's motion to be dismissed as an improper party respondent. (Doc. no. 9.) Petitioner has filed a response to the motion. (Doc. no. 14.) For the reasons set forth below, the Court **REPORTS** and **RECOMMENDS** that the motion be **GRANTED** and that the Attorney General be **DISMISSED** from this case.

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<sup>1</sup>Thurbert Baker was originally named as a Respondent in the instant petition. In the time since the petition was filed, Sam Olens has replaced Mr. Baker as Georgia's Attorney General. Therefore, under Federal Rule of Civil Procedure 25(d), Mr. Olens (hereinafter "Attorney General") is automatically substituted for Mr. Baker as a Respondent in this action.

## **I. BACKGROUND**

On October 5, 2004, Petitioner was convicted in the Superior Court of Richmond County of felony murder and possession of firearm during the commission of a crime. (Doc. no. 1, p. 4.) Petitioner was sentenced to life imprisonment for felony murder and an additional five year consecutive sentence for the firearm conviction. (Id.) Petitioner filed a direct appeal with the Supreme Court of Georgia, which affirmed his convictions on October 16, 2006. (Id.)

On June 14, 2007, Petitioner filed a state habeas corpus petition in the Superior Court of Macon County. (Id.) This petition was denied on June 28, 2009. (Id. at 5.) Thereafter, on May 17, 2010, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal. (Id.) Petitioner filed his federal petition on August 16, 2010, asserting eight grounds for relief and naming two respondents: (1) Gregory McLaughlin, the Warden of Macon State Prison, and (2) Thurbert Baker, who was Georgia's Attorney General at the time the petition was filed. (See generally id.)

## **II. DISCUSSION**

The Court finds that the Attorney General is an improper Respondent and should be dismissed. Pursuant to 28 U.S.C. § 2242, an application for a writ of habeas corpus shall allege the name of the person having custody over a petitioner. Furthermore, Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts states that for habeas petitioners who are currently in the custody of the state, "the petition must name as respondent the state officer who has custody." The Advisory Committee Notes to Rule 2 explain that the state officer having custody of the petitioner, often a prison warden, is the

appropriate respondent when a petitioner is seeking relief from a sentence for which he is currently incarcerated. The Notes further explain that the state Attorney General is an appropriate party respondent when the petitioner is attacking a sentence which will be carried out in the future or for which the petitioner is not incarcerated, on probation, or on parole. As another federal court has explained, "[T]he only proper respondent in a collateral attack is the petitioner's custodian. . . . If the petitioner is in prison, the warden is the right respondent. . . . A state's attorney general is a proper party only if the petitioner is not then confined, but expects to be taken into custody." Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996).

As Petitioner is challenging the sentence for which he is currently incarcerated, Warden McLaughlin is the only proper Respondent. The Attorney General's motion to dismiss should therefore be granted.

### III. CONCLUSION

For the reasons set forth above, the Court **REPORTS** and **RECOMMENDS** that the Attorney General's motion to dismiss (doc. no. 9) be **GRANTED** and that the Attorney General be **DISMISSED** from this case.

SO ORDERED this 18th day of February, 2011, at Augusta, Georgia.

  
W. LEON BARFIELD  
UNITED STATES MAGISTRATE JUDGE